Supreme Court, U.S.
FILED
94 373 AUG 3 1994
OFFICE OF THE CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

CALVIN J. WEBER,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

On Petition For Writ Of Certiorari
To The U.S. Court Of Appeals
For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

CALVIN J. WEBER, pro se
4620 Charter Dr.
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42 pp

STATEMENT OF QUESTION

If there are findings of prohibited personnel practice by both the OSC and and the head of the agency during an OSC investigation into a whistleblower reprisal complaint (and the agency does not refute the findings), did the MSPB rule correctly by applying holdings in pre-Whistleblower Protection Act (WPA) appellate jurisdiction cases to deny whistleblower a hearing for exercising priority transfer rights and the right to seek reimbursement of attorney's fees (rights granted by WPA) if whistleblower files an Individual Right of Action for Corrective Action ?

REFERENCE TO OFFICIAL OPINIONS DELIVERED BY U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT AND THE MERIT SYSTEMS PROTECTION BOARD (MSPB)

U.S. Court of Appeals for the Federal Circuit Judgment, dated May 13, 1994, on appeal from MSPB, in Case No. SL-1221-91-0388-W-1.

MSPB (Full Board) Opinion and Order, SL-1221-93-0388-W-1 dated Sep 23, 1993

MSPB (Regional Board) Initial Decision, SL-1221-91-0388-W-1, dated November 13, 1991

DATE OF ENTRY OF JUDGMENT

This petition for a Writ of Certiorari requests a review of the Judgment entered on May 13, 1994 by the U.S. Court of Appeals for the Federal Circuit which affirmed MSPB (Full Board's) Opinion and Order dated Oct 25, 1993 affirming the Initial Decision to deny petitioner a hearing to seek corrective action under the 1989 Whistleblower Protection Act (WPA) Individual Right of Action (IRA) for corrective action.

STATUTORY PROVISION BELIEVED TO CONFER JURISDICTION

Petitioner believes the statutory

provision of WPA's IRA for "Certain Reprisal Cases," and the Board's misinterpretation of that provision, confers on the Supreme Court jurisdiction to review the judgment made against petitioner.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provision involved is the denial of "Due Process of Law."

CONCISE STATEMENT CONCERNING FACTS

The actions leading up to petitioner's IRA appeal consisted of a complaint first filed with the OSC, alleging the agency's (Dept of the Army) proposed and final decision to remove petitioner from federal civil service in Feb-May 1990 was in retaliation for petitioner's whistleblowing activities regarding waste and mismanagement.

The OSC conducted a ten (10) month investigation and found sufficient evidence of prohibited personnel practice to refer the results of its investigation to the head of the agency (Office of the Assistant

Secretary of the Army) for possible corrective and disciplinary action. The head of the agency then conducted a four (4) month investigation.

Within the "Results of Investigation" report (approximately 600 pages) was a finding that "the decision to remove appellant <petitioner> was tainted by reprisal for the appellant's engaging in protected activity." The removal was cancelled and a suspension substituted. The suspension was appealed and adjudicated with a signed agreement by the agency that included petitioner's right to pursue an IRA for petitioner's own corrective action for relief pursuant to 5 U.S.C. § 1221(b).

However, the Board denied petitioner the right to seek corrective action by denying petitioner a hearing. The Board "concluded that it would follow its prior holdings in pre-Whistleblower Protection Act (WPA) appellate jurisdiction cases, that an agency's recission of an action divests the

Board of jurisdiction over an appeal."

However, the Board's holding is contrary to WPA's Individual Right of Action which states in 5 U.S.C. § 1221(a) that an individual may seek corrective action from the Board if prohibited personnel practices described in section 2302(b)(8) are found; prohibited personnel practices were found.

Pursuant to 1221(e)(2), the only reason that corrective action may not be ordered is if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure (the agency submitted no evidence). Nowhere in 1221 is it stated that an individual can be denied a hearing for corrective action simply because the agency rescinds the action which has been found to be tainted with reprisal.

BASIS FOR FEDERAL JURISDICTION

The basis for federal jurisdiction in the Court of Appeals is that CSRA of 1978 grants a judicial review of MSPB's decision.

DIRECT AND CONCISE ARGUMENT

The Board's conclusion to follow its holdings made in pre-WPA cases defeated the purpose of the Act's IRA. Cases referred to by the Board are not similar. There was no evidence that either of the individuals first sought and exhausted their remedies with the OSC, or that OSC gave notice that corrective action with the Board "may be filed." Also, there was no "finding of prohibited personnel practice" or that either individual was a prevailing party meeting in showing "clear and convincing evidence." Also, the individuals asked for fuller relief whereas petitioner only asked for achieving "status quo ante."

Petitioner was denied at a minimum the right to a Priority Transfer, reimbursement of legal fees, and the opportunity to expunge false facts from petitioner's personnel file. Also, to bolster dismissal, the Board made up and addressed their own issues not in the IRA, namely the 30 day suspension and fuller relief.

Note: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

94-3033

CALVIN J. WEBER,

Petitioner,

v.

MERIT SYSTEMS PROTECTION BOARD,

Respondent.

JUDGMENT

ON APPEAL from the Merit Systems Protection Board in CASE NO SL1221910388-W-1. This CAUSE having being heard and considered it is ORDERED and ADJUDGED: AFFIRMED.

See Fed. Cir. R. 36.

Per Curiam (NEWMAN, MICHEL, and RADER, Circuit Judges).

DATED: MAY 13, 1994

ENTERED BY ORDER OF THE COURT

S/ Francis X. Gindhart, Clerk

Issued as a mandate: June 3, 1994

Filed May 13, 1994

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CALVIN J. WEBER Appellant	)	DOCKET NUMBER SL1221910388W1
v.	)	
DEPARTMENT OF THE ARMY Agency	)	DATE: SEP 23, 1993

Calvin J. Weber, Arnold, Missouri, pro se

Abby K. Horwitz, Esquire, St. Louis, MO
for the agency

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

OPINION AND ORDER

The appellant petitions for review of the initial decision issued on November 13, 1993, that dismissed his individual-right-of-action (IRA) appeals. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore, DENY it. We REOPEN this case

on our own motion under 5 C.F.R. § 1201.117, however, AFFIRM the initial decision as MODIFIED by this Opinion and Order, and DISMISS the IRA appeals.

BACKGROUND

On March 15, 1990, the agency proposed to remove appellant from his position of General Engineer based upon various charges of misconduct. The appellant sought corrective action regarding this matter from the Office of Special Counsel, alleging that the agency proposed his removal in retaliation for whistleblowing activities. Although the agency issued a final decision that set an effective date for the appellant's removal, it postponed the removal pending resolution of the appellant's Special Counsel complaint.

On October 29, 1990, the Special Counsel notified the agency that it had completed its investigation of the appellant's complaint, and was referring

the results of its investigation to the agency for possible corrective and disciplinary actions. On April 18, 1991, the agency's Office of the General Counsel determined that, although the selection of the removal penalty was improperly influenced by the appellant's protected disclosures, lesser discipline was warranted for his misconduct. On May 16, 1991, the agency, therefore, cancelled the decision to remove the appellant. The next day the agency proposed to suspend the appellant for 30 days based upon the same misconduct at issue in the removal action.

On June 14, 1991, the Office of Special Counsel declined to take further action, and notified the appellant of his right to appeal to the Board. On August 9, 1991, the appellant filed an IRA appeal of the proposed removal with the Board's St. Louis Regional Office. On August 16, 1991, he filed an IRA appeal of the proposed 30

day suspension.[1] In these appeals, the appellant requested monetary relief, and discipline against agency officials, as part of the sought after corrective action.

The administrative judge joined the appeals for adjudication, and provided the parties an opportunity to submit and argument regarding the Board's jurisdiction over these matters. Upon considering the submissions, the administrative judge dismissed the appeals, finding as follows: (1) The IRA appeal of the proposed removal was moot because the agency completely rescinded that action; (2) the appellant is not entitled to compensatory damages in an IRA appeal; and (3) the Board lacks jurisdiction over the

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1 After the suspension was effected, the appellant filed an appeal of that action as well. This appeal was dismissed as settled in Weber v. Department of the Army, MSPB Docket No. SL07529104121I1 (Dec. 10, 1991) (Initial Decision). This decision became final on January 14, 1992.

appellant's IRA appeal of his proposed suspension because he did not previously seek corrective action from the Special Counsel, and the proposed suspension is not otherwise appealable to the Board.

In his petition for review, the appellant contends that his IRA appeal of the proposed removal is not moot because the cancellation of that proposed action does not address his monetary and medical problems caused by the agency's retaliation for his whistleblowing activities, and because the agency's suspension proposal precludes such a mootness finding. The appellant also asserts that the administrative judge erred in dismissing his IRA appeal of the proposed suspension.[2]

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[2] The appellant has also filed a reply to the agency's response to his petition for review. We have not considered the appellant's reply, however, because it was submitted after the record closed and without a showing that it is new and material evidence that was not available before the record closed. See 5 C.F.R. 1201.114 (i); Petition for Review File, Tabs 6,7.

ANALYSIS

Neither of the appellant's IRA appeals is properly before the Board because both of the actions at issue have been rendered moot.

In dismissing the IRA appeal of the proposed removal as moot, the administrative judge relied upon the Board's decisions in Mulherin v. Dept of the Air Force, 45 M.S.P.R. 289 (1990), and Godfrey v. Dept of the Air Force, 45 M.S.P.R. 298 (1990). In these cases, the Board concluded that it would follow its prior holdings in pre-Whistleblower Protection Act (WPA) appellate jurisdiction cases, that an agency's rescission of an action divests the Board of jurisdiction over the appeal. Mulherin, at 291; Godfrey at 302. In doing so, the Board rejected the appellants' assertions that rescission did not provide them with a complete remedy because they sought discipline for agency

officials who retaliated against them. Mulherin, at 291-92; Godfrey, at 301-02.

Under these cases, the administrative judge correctly concluded that the agency's cancellation of the removal rendered the IRA appeal of the proposal to remove moot. Further, the appellant's assertion that he has not received a complete remedy is unavailing for the same reasons discussed in Mulherin. There, the Board found that neither the language of the WPA, nor its legislative history, supports a finding that the cancelled actions, absent more, provide a sufficient basis for the Board jurisdiction under the circumstances presented in cases as the present one. Here, as in Mulherin, we find that there would be no further relief that we could grant the appellant even if we found his allegations of reprisal

substantiated.[3] Mulherin at 291-92. We therefore conclude that the administrative judge correctly dismissed the IRA appeal of the proposed removal as moot.

Further, contrary to the appellant's view, we find that the agency's issuance of the proposed suspension notice does not preclude a finding that the proposed removal is moot. As just discussed, the appellant's proposed removal appeal is moot because there is no further relief that we could grant the appellant even if we found his allegations of reprisal substantiated. Moreover, an agency is not precluded from

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3 This result is consistent with pre-WPA corrective action cases where the Board has not included the award of monetary damages to be within the ambit of the corrective action it may take upon a finding that an agency has committed a prohibited personnel practice. See In re Frazier, 1 M.S.P.R. 163, 197-98 (1979). We further note that Roth v. United States, 952 F.2d 611 (1st Cir. 1991), also supports the proposition that an appellant is not entitled to monetary awards under the Civil Service Reform Act or the WPA.

rescinding a proposed action and substituting another action in its place. See Cabral v. Department of Health & Human Services, 7 M.S.P.R. 372, 373-74 (1981); Dejoy v. Department of Health & Human Services, 2 M.S.P.R. 577, 580 (1980).

In dismissing the appellant's IRA appeal of the proposed suspension, the administrative judge found that the appellant failed to show that he exhausted his administrative remedies with the Office of Special Counsel regarding this matter prior to appealing it to the Board. Initial Decision at 8-9. We need not decide this issue, however, because, as we stated earlier at 3 n.1, the appellant's Chapter 75 appeal of the effected suspension was dismissed as settled. Such a dismissal moots the question of the legitimacy of the proposal in that action. See Young v. Department of Energy, 21 M.S.P.R. 541, 543 (1984) (where an appealable action is rendered moot, the

Board no longer has jurisdiction over related claims).

ORDER

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. 1201.113(c).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeals if the court has jurisdiction. See 5 U.S.C. 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever

receipt occurs first. See 5 U.S.C. 7703(b)(1).

FOR THE BOARD: S/ Robert E. Taylor
Clerk of the Board

Washington, D.C.

CERTIFICATE OF SERVICE

I certify that this OPINION and ORDER was sent today:

By certified mail to:

Calvin J. Weber
4620 Charter Drive
Arnold, MO 63010

By regular mail to:

Abby K. Horwitz, Esq.
Department of the Army
HQ, U.S. Army Aviation & Troop Command
Attn: AMSAT-C-JGA
4300 Goodfellow Boulevard
St. Louis, MO 63120-1798

Marjorie Marks
Office of Personnel Management
Employee Relations Division
1900 E Street, N.W., Room 7412
Washington, DC 20415

Merit Systems Protection Board
St. Louis Regional Office
911 Washington Avenue, Suite 410
St. Louis, MO 63010-1203

By hand carry to:

Office of Special Counsel
1730 M Street, N.W., Suite 300
Washington, DC 20036-4505

Sep 23, 1993 S/ Robert E. Taylor
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ST. LOUIS REGIONAL OFFICE

CALVIN J. WEBER Appellant	)	
	)	DOCKET NUMBER SL1221910388W1
v.	)	
	)	DATE: November 13, 1991
DEPARTMENT OF THE ARMY Agency	)	

Mark B. Clevenger, Esquire, St. Louis, MO
for the appellant.

Abby Horwitz, Esquire, St. Louis, MO,
for the agency

BEFORE

T. Christopher Heavrin
Administrative Judge

INITIAL DECISION

On August 9, 1991, the appellant timely sought corrective action from the Merit Systems Protection Board the (the Board). The appellant filed an Individual Right of Action (IRA) appeal in order to challenge an agency proposal to remove him from his position dated February 23, 1990. The

appellant sought a remedy through the Board under 5 U.S.C § 1221(a) and 5 C.F.R. § 1209.5(a). The appellant maintained that the foregoing personnel action was taken in reprisal for his having made protection disclosures as defined in 5 U.S.C. § 2302(b)(8).[1] For the following reasons, I DISMISS the appellant's IRA appeal.

ANALYSIS AND FINDINGS

Background

The appellant occupied the position of General Engineer with the Department of the Army's Army Acquisition Executive Support Agency, Office of the Program Executive Officer, Aviation, Product Assurance and Test Division (PATD), Aircraft Survivability Equipment Project Manager's Office (ASE PMO), in St. Louis, Missouri. Appeal File (AF), Volume (Vol.) 1, Tab 1,

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[1] See Whistleblower Protection Act, Pub. L. No. 101-12, 103 Stat 16, July 9, 1989.

Exhibit (Ex.) 6. On Mar 15, 1990, following his receipt of the agency's notice of proposed removal, the appellant sought corrective action from the Office of Special Counsel (OSC). Id. at Ex. 1. The appellant's security clearance was suspended by his agency's security organization effective March 27, 1990. Accordingly, he was unable to continue performing in the position he normally occupied while the agency processed the adverse action. Id. at Ex. 14. The foregoing agency security measures, however, may not be reviewed by the Board in this case. See Department of the Navy v. Egan, 484 U.S. 518, 108 S.Ct. 818, 98 L. Ed.2d 918 (1988).

On May 14, 1990, the agency issued a final decision to the appellant informing him that his removal for various charges of misconduct would be effective May 18, 1990. Id. at Ex. 12. On May 18, 1990, the agency issued the first series of notices to the

appellant advising him that the effective date of his removal was postponed pending the resolution of his complaint to OSC. Id. at Ex. 13. The agency ultimately never effected the appellant's removal. On December 3, 1990, the appellant was detailed into a General Engineer position, at the same grade and pay level he formerly held but with duties expressed in a newly revised statement of functions. The appellant was assigned to perform these duties at the U.S. Army Aviation Systems Command (AVSCOM), Engineering and Housing Division, Charles Melvin Price Support Center, Granite City, Illinois. Id. at Ex. 15.

On October 29, 1990, the OSC notified the agency that it had completed its investigation of the appellant's whistleblower complaint and that it was referring the results of its investigation to the agency for possible corrective and disciplinary actions. Id. at Ex. 2, OSC

File No. MA-90-657, submitted by the appellant as an attachment to his appeal. On April 18, 1991, Lieutenant General August M. Cianciolo forwarded to the Office of Program Executive Officer, Aviation, the approved recommendation of the agency's Office of the General Counsel that the decision to remove the appellant was influenced inappropriately because of the appellant's protected disclosures. Id. at Memorandum dated March 12, 1991 concerning AR 15-6 Investigation, at page 15, attachment to appellant's appeal. The agency concluded that the appellant was still subject to discipline but agreed that the selection of the removal penalty was tainted by reprisal for the appellant's engaging in protected activity. Id.

On May 16, 1991, the agency's Project Manager at ASE PMO in St. Louis signed a memorandum in which he cancelled the decision to remove the appellant which had been pending since May 14, 1990. Id. at

Vol. 4, Tab 8, Subtab 4k. The appellant was further advised that the case was still under review and that due to the suspension of his security access, he was to continue on his detail at the Price Support Center Id.

On May 17, 1991, the agency proposed the appellant's suspension for 30 days for the same misconduct for which removal was initially proposed. Id. at Subtab 4j. On August 9, 1991, the appellant filed the instant IRA appeal with this office. Id. at Vol. 1, Tab 1. On August 16, 1991, the appellant tendered another appeal to this office concerning the notice of proposed suspension issued on May 17, 1991. Id. at Vol. 4, Tab 3. On August 22, 1991, the agency issued its decision to suspend the appellant for 30 days effective September 3, 1991. Id. at Tab 8, Subtab 4b. On September 19, 1991, this office received appellant's appeal of the 30-day suspension. That appeal was docketed and

assigned case number SL07529104121I1. On September 30, 1991, the appeal of the appellant's 30-day suspension was consolidated with the appellant's IRA appeal of the proposed removal issued in February 1990. Id. at Tab 17. On October 11, 1991, the agency moved that the appellant's IRA appeal concerning the proposed removal action be dismissed because it had been rendered moot by the agency's unilateral action of cancelling the proposal to remove the appellant. The agency also asked that the Board dismiss the appellant's tendered appeal of the proposed 30-day suspension arguing that the appellant did not exhaust his administrative remedy by first taking the matter of the proposed 30-day suspension to the OSC. Id. at Tab 18.

<u>The agency totally rescinded the proposed removal which was the subject of the appellant's complaint to OSC.</u>

The appellant was given the

opportunity to respond to the agency's motion that his IRA appeal should be dismissed because the agency had returned him to the status quo ante. The appellant and his attorney both filed submissions in which they argued that the appellant was not returned to status quo ante. They contended that this was so because the day after the agency cancelled the removal decision, it proposed his suspension for the same misconduct and the suspension was then effected on September 3, 1991. Id. at Tabs 20 and 22. The appellant further argued that the circumstances of the controlling Board case law, as cited by the agency in its motion to dismiss, were distinguishable from the facts surrounding his IRA appeal.

The agency cited the Board's decisions, Mulherin v. Department of the Air Force, 45 M.S.P.R. 289 (1990), and Godfrey v. Department of the Air Force, 45 M.S.P.R. 298 (1990), as supportive of its motion that the appellant's IRA should be

dismissed. In the Mulherin decision, 45 M.S.P.R. at 291, the Board held that it lacked jurisdiction to consider the employee's appeals of a written reprimand and a 5-day suspension because once the agency completely rescinded the actions, the employee was returned to the status quo ante and the Board was thereby divested of jurisdiction. By rescinding the appealed actions, the Board stated, the agency in Mulherin had afforded relief equivalent to that which he could have received from the Board if the matters were adjudicated. Id. at 292. The Board rejected appellant Mulherin's claim that a complete remedy would have been the suspension of five managers and their transfer to another location. Id. at 291-92.

In Godfrey v. Department of the Air Force, 45 M.S.P.R. at 298, 302, the Board applied its Mulherin analysis to the appeal of an employee who had received a reprimand. The agency cancelled the

reprimand. The Board found that once the agency rescinded the reprimand, the appellant had received relief equivalent to that which he could receive from the Board. Thus, the Board held, the appeal of the reprimand became moot as a result of the cancellation of the appealed action.

The appellant in the Godfrey case, like appellant Mulherin, argued that disciplinary action should be taken against his managers. The Board concluded, however, as it did in the Mulherin decision, that such a request was not within the scope of the Board's authority in an appeal under 5 U.S.C. § 1221. Id; see also 5 U.S.C.§§ 1212(a) (2) (B) and 1215.

The appellant attempted to distinguish the foregoing decisions from his circumstances by arguing that the foregoing appeals were not IRA appeals. AF, Vol. 4, Tab 22. Thus, the Board's rulings were not applicable to his IRA appeal. Although the

Board's decisions did not specifically state that the Mulherin and Godfrey cases were IRA appeals, a review of the appeals as regards the appealed actions demonstrates, unequivocally, that they were IRA appeals like the appellant's appeal of his proposed removal.

Neither the reprimands nor the 5-day suspension, the three actions appealed to the Board under the provisions of the Whistleblower Protection Act of 1989 (WPA) in the Mulherin and Godfrey appeals are actions which are otherwise appealable to the Board. See 5 C.F.R. § 1201.3. Accordingly, it is only through an IRA appeal that the two employees could have sought to have their claims of reprisal for whistleblowing adjudicated by the Board. See 5 U.S.C. §§ 1214(a)(3) and 1221(a) and 1221(a) and (b); 5 C.F.R. §§ 1209.2(b) (1) and 1209.4. I therefore find that the principles established in the Mulherin and Godfrey decisions concerning IRA appeals

are applicable to the appellant's IRA appeal as well.

Based on the foregoing, I reject the appellant's claim that he was not returned to the status quo ante because he did not obtain the relief he sought. The appellant, like the appellants in Mulherin and Godfrey, wanted the Board to take disciplinary action against his managers who improperly selected removal as the discipline to be imposed on him for his alleged misconduct. As the Board concluded, such action was not within its authority in an IRA proceeding.

In addition, I do not find persuasive the appellant's claim that the fact the agency proposed and effected a 30-day suspension following its cancellation of the removal decision shows that he was not returned to the status quo ante. The record shows that the agency completely cancelled the removal decision. The proposed removal was likewise cancelled by

the foregoing agency action rescinding the removal decision. The agency initiated a totally new adverse action when it proposed the appellant's 30-day suspension on May 17, 1991. It then issued a final decision effecting the appellant's suspension and the appellant appealed that action to this office and it is currently pending before this tribunal and will be given full review.[2] The appellant therefore has a remedy for the adverse action which he has subsequently received. I cannot find that the proposed removal action for which he sought corrective action from the OSC was not completely rescinded.

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2 In view of my decision that the IRA appeal is not within the Board's appellate jurisdiction, I hereby terminate the consolidation involving the instant IRA appeal and the appeal of the 30-day suspension with Docket No. SL07529104121I1. The latter case will continue to be processed and adjudicated in accordance with appropriate Board procedures.

The appellant is not entitled to compensatory damages in an IRA appeal.

The appellant also argued that his IRA appeal should not be dismissed because he has not been compensated for the emotional damage and physical illnesses he and his wife have suffered allegedly due to the reprisal taken against him for his whistleblowing activities. He claimed that monetary relief for these effects should be part of the corrective action he is entitled to receive in his successful IRA complaint to the OSC.

First, I note that the appellant's claim for monetary compensation for emotional damage and physical illnesses allegedly due to the agency's reprisal against him is not specifically authorized by the WPA. In fact, the statute merely states that the Board will order the corrective action that the Board deems appropriate if whistleblowing retaliation

is found. 5 U.S.C. § 1221(e)(1). As to what the Board considers appropriate concerning requests for monetary relief in situations where there has been an improper personnel action, a review of several Board decisions is enlightening.

In Kennedy v. United States Postal Service, 42 M.S.P.R. 429, 431 (1989), the Board held that the reimbursement of consequential expenses or compensatory damages incurred as a result of an improper personnel action is not provided for by "any authority." The Board had reached the same conclusion in another earlier case. See Kopp v. Department of the Air Force, 37 M.S.P.R. 434, 437 (1988).

Concededly, the WPA does not apply to the United States Postal Service, which was the agency in the Kennedy case. See Mack v. United States Postal Service, 48 M.S.P.R. 617, 621 (1991). Further, when the Board issued the Kopp decision in 1988, the WPA had not yet been enacted. The above

decisions therefore are not directly applicable to the appellant's case. However, the basic principle in these decisions, i.e., that there must be a specific authority in a statute for payment of consequential expenses and compensatory damages cannot be in doubt.

A review of the legislative history for the WPA gives more insight into this matter in its discussion of attorney fees and other reasonable costs to be awarded to a prevailing party concerning a issue of reprisal for protected diclosures. See Joint Explanatory Statement at 135 Cong. Rec. H749 (daily ed. March 21 1989). Under 5 U.S.C. § 1221(g)(1), an agency which has committed a prohibited personnel practice under the WPA is liable for "reasonable attorney's fees and any other reasonable costs incurred." Congress has indicated that the phrase "any other reasonable costs incurred" is meant to include costs directly related to litigation but it is not meant

to include "other extraneous costs such as job retraining." Id.

I correlate the monetary damages sought by the appellant in his IRA to the "extraneous costs such as job retraining" mentioned in the legislative history. Accordingly, I find that the appellant's request for compensatory damages and consequential expenses is not obtainable under the WPA.

My above finding is further bolstered by the fact that at 5 U.S.C. § 1222, Congress specifically provided that the WPA was not intended to create a new cause of action, but at the same time, the individual whistleblower was not precluded from seeking any right or remedy he may have under any other statute. See 135 Cong. Rec. at S2784 (daily ed. March 16, 1989). Thus, the appellant could attempt to seek compensatory damages under the Federal Torts Claim Act if he believes that he is the victim of tortious conduct. See

28 U.S.C. §§ 1346(b), 2671-2680. In addition, he could seek any other remedy which has been provided by any other statute. Nevertheless, although the appellant's claims for monetary relief from the agency have not been provided, I find that he has failed to show that he was not returned to the status quo ante. Thus, I find that his appeal has been rendered moot by the agency's actions in this case.

In addition, I find that the appellant's tendered appeal of the proposed 30-day suspension cannot be reviewed by the Board. The Board has no jurisdiction over a proposed suspension unless the appellant shows that he has sought corrective action from the OSC and has exhausted OSC proceedings. Shillinger v. Department of Labor, 47 M.S.P.R. 145, 151 (1991). The appellant did not present any evidence that he exhausted his administrative remedy with OSC. Accordingly, the proposed suspension is not subject to review. It should be

noted again, however, that the appellant does have an appeal of the 30-day suspension currently pending before this office.

DECISION

The appeal is DISMISSED.

FOR THE BOARD: S/ T. Christopher Heavrin
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on December 18, 1991, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important

because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Suite 802
Washington, DC 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

CERTIFICATE OF SERVICE

I certify that the attached Document(s) was (were) sent by regular mail this day to each of the following:

Appellant

Mr. Calvin J. Weber
4620 Charter Drive
Arnold, MO 63010

Appellant's Representative

Mr. Mark B. Clevenger
Attorney At Law
1620 S. Florissant Road
St. Louis, MO 63121

Agency's Representative

Ms. Abby Horwitz
Department of the Army
U.S. Army Aviation Systems Command
Attn: AMSAV-JR
4300 Goodfellow Boulevard
St. Louis, MO 63120-1798

Other

Ms. Marjorie Marks
U.S. Office of Personnel Management
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